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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1753

JOHN CONWAY and ROBERT O'BRIEN,
Petitioners,

versus

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

JOHN CONWAY and ROBERT O'BRIEN,
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STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

John Conway and Robert O'Brien petition for a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi rendered on March 12, 1980 is not as yet officially reported but a copy of the opinion is printed herein as Appendix A.

JURISDICTION

The mandate of the Supreme Court of Mississippi is printed herein as Appendix B and was entered on April 18, 1980 and the Petition for Rehearing to the Supreme Court of Mississippi was denied on April 16, 1980 and is printed herein as Appendix C. The petitioners, having exhausted their state court remedies, petition this Honorable Supreme Court of the United States under the jurisdiction of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

The questions presented herein are whether the petitioners' Fourth and Fourteenth Amendment Rights were violated by their arrests and the subsequent admission of evidence and more particularly:

1. Was the arrest made without a warrant valid since the officers had more than sufficient time and opportunity to procure an arrest warrant but chose not to?

2. Is the Mississippi Supreme Court determination of probable cause based on "self-verifying" information contrary to this Honorable Court's assessment, thus denying petitioners due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the United States Constitution provides in the Section pertinent herein:

> "(N)or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

The twenty-third Section of the Mississippi Constitution provides:

> "The people shall be secure in their persons, houses and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."

The Fourteenth Section of the Mississippi Constitution provides:

> "No person shall be deprived of life, liberty, or property except by due process of law."

Also involved, is Section 99-3-7 of the Mississippi Code of 1972 as annotated and amended:

> "An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.
>
> Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through official channels that the warrant is outstanding for that person's arrest. In such cases, the officer making the arrest must inform such person at the time of the arrest the

object and cause therefor. If the person arrested so requests, the warrant shall be shown to him as soon as practicable."

Also, Rule 1.02 of the Mississippi Uniform Criminal Rules of Circuit Court Practice, which have been approved by the Mississippi Supreme Court, and now have the authority of statutory law:

"An officer may arrest any person without a warrant under the following circumstances:

(1) For an indictable offense or breach of the peace, including those threatened or attempted, committed in the presence of an officer;

(2) Where there is a warrant in existence for a misdemeanor, and the officer has personal knowledge of the warrant;

(3) When a felony has been committed, and the officer has reasonable grounds to believe the person proposed to be arrested committed it;

(4) When a charge has been made upon reasonable grounds to believe the party proposed to be arrested has committed some felony;

(5) When a person has committed a felony, though not in the presence of the officer.

> In all cases of arrest without a warrant, the person making such arrest must inform the accused of the object and the cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit."

STATEMENT OF THE CASE

This cause involves the application and interpretation of the United States Constitution's Fourth Amendment requirement for an arrest warrant. The question results from an absence of an arrest warrant when the petitioners herein were arrested at which time incriminating evidence was seized from them.

The petitioners were arrested on July 2, 1978 and subsequently indicted for the possession of a controlled substance with intent to deliver. (Miss. Code 1972 annotated and amended, Section 41-29-132)

A motion to suppress was filed because the arrest was made without an arrest warrant and the evidence showed, by the officer's own testimony, that adequate time and opportunity to obtain an arrest warrant had existed.

Testimony further showed officers had received information approximately 18 hours before the arrest and relied on such information by following petitioner Conway to the Mobile, Alabama airport.

Petitioner O'Brien arrived and petitioners left to return to Pascagoula, Mississippi where they resided and were followed by the officers who made the decision in Alabama to pull over and arrest petitioners as soon as they "crossed the Mississippi line".

Petitioners, unaware that they were being followed, pulled over to the side of the highway on their own volition and the trailing agents immediately pulled over and "formally" placed them under arrest.

The officers then took the position they did not know who to get an arrest warrant for, yet the person who was their informant and upon whose information they relied for "sufficient probable cause" testified he specifically named petitioner Conway to the officers.

It was further argued by the officers that they did not have sufficient probable cause to obtain a warrant, yet a warrantless arrest based upon probable cause was made upon the same information they deemed insufficient for a warrant.

Petitioners, always contending a lack of probable cause to justify a warrantless arrest, moved the evidence be suppressed. Although the trial court stated it was a "close question", it overruled the motion.

In spite of the fact Mississippi law is absolutely clear that an arrest begins when the pursuit to make the arrest begins, the officers argued the drugs were in "plain view" and were, therefore, justified in arresting

the petitioners. Only when they saw certain items in plain view did they claim they arrested petitioners, thus contradicting their own clear testimony.

The officers, therefore, took two opposing views of probable cause and the arrest requirement and the trial court condoned their conduct.

With the evidence obtained through their warrantless arrest and search, the petitioners were convicted and sentenced to a 20 year term in the Mississippi Department of Corrections and fined $15,000.00. All proper motions were filed and an appeal was taken to the Mississippi Supreme Court.

After oral argument, the Mississippi Supreme Court affirmed the cause in contradiction of its own previous decisions concerning arrest and probable cause, yet did not specifically overrule their precedent.

While grossly misjudging crucial facts, which bear tremendously on the outcome and upon the questions of law, the court specifically stated it was "impractical" for the agents to obtain an arrest warrant.

Petitioners strongly urged the Mississippi Supreme Court to grant a rehearing so that the errors of law and fact could be addressed and also that the status of the law could be clarified.

The Petition for Rehearing was denied as shown by the Order printed herein as Appendix C, therefore,

petitioners would show they have exhausted their state remedies and have been denied due process of law, not only by the lack of suppression at the trial level, but also by the Mississippi Supreme Court, which declined to reverse the cause, after being presented the Constitutional issues and arguments submitted to it by petitioners.

REASONS FOR GRANTING THE PETITION

1. **The primary reasons for granting certiorari is to answer the question of whether a law enforcement official is required to obtain an arrest warrant before he arrests a person when adequate time and opportunity are available.**

Time and opportunity were unquestionably available here. The agents testified they had time and only the Mississippi Supreme Court found it "impractical" to obtain an arrest warrant.

Petitioners ask the Court to answer the question in the affirmative, that a warrant, when time and opportunity are available, is necessary. If the actions here are proper, indeed is there ever need for a warrant?

Law enforcement officials may feel they have probable cause to arrest yet it must be remembered this determination is a judicial function. The courts, through a detached and neutral magistrate, should be the ones to determine if the burden has been met.

The Mississippi court has held that arrests without arrest warrants where no crime has been committed in the officers' presence are illegal and the evidence obtained through these arrests must be suppressed. *Keyes v. Miss.*, 283 So.2d 919 (1973); *Smith v. Miss.*, 128 So.2d 875 (1961). Also this Court has held that evidence obtained through an unconstitutional arrest must be suppressed. *Brown v. Illinois*, 422 U.S. 590, 93 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

Here not only was a warrant absent, but while cases decided by this Honorable Court on a similar question affirm a warrantless arrest, the information relied on was not proven reliable. (See *U.S. v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976))

Unfortunately the two issues cannot be separated and treated distinctly for the lack of constitutionally required probable cause is the crucial element to determine the need for a warrant. The fruits of an arrest and search make the probable cause available before the arrest seem sufficient and add weight to the information that would not otherwise meet this Court's test of reliability.

Petitioners ask this Court to answer that officials should not dodge the warrant requirement because they feel they have probable cause when it is not established by evidence strong enough to convince a magistrate.

Reasonableness for a warrantless arrest is still the constitutionally required standard and the analysis must commence with the rules established in Fourth Amendment litigation involving tangible items. *Beck v. Ohio*, 379 U.S. 89, *Delaware v. Prouse*, 440 U.S. 648.

Strangely enough, the law now gives greater Fourth Amendment protection to property rather than to persons.

> "The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitution for the judicial warrant required by the Fourth Amendment." See *U.S. v. U.S. District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Arkansas v. Sanders*, 99 S.Ct. 2586 (1979)

In the recent case of *Payton v. New York*, 27 Cr. L. 3033 it is stated:

> "The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with the rules that have been established in the Fourth Amendment litigation involving tangible items."

While *Payton*, supra, deals specifically with the reasonableness of a warrantless arrest in the home, petitioners would show it is just as applicable here for a personal liberty deprived by unconstitutional arrest is just as repugnant wherever it occurs.

Also in *Payton*, sufficient probable cause was admitted, but here it is not and is most strenuously denied and not proven to this Court's required level. *Spinelli v. U.S.*, 398 U.S. 401 (1969); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)

Under the purview of *Payton v. New York*, the petitioners ask the Court to grant certiorari to hold that where sufficient time and opportunity is available law enforcement officials must secure an arrest warrant where they only suspect a crime has been committed.

U.S. v. Watson, supra, held that law enforcement officials' assessment of probable cause would be more readily acceptable if a magistrate issues a warrant but in the same opinion held a warrant was not required. (Also see *U.S. v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965))

In *Watson* the Court stated that the law once only allowed exigent circumstances to justify a warrantless arrest but later the law was interpreted to allow warrantless arrest on probable cause.

The justification by the *Watson* decision is that it would "encumber prosecution" with respect to exigent circumstances because various court proceedings would be required. Petitioners would show that court action is still required and the "encumbrances" occur nevertheless in the determination of probable cause since it is primarily a judicial function also.

Petitioners would show the great diversity in treatment between the arrest and search warrants is not constitutionally justified. Regarding searches, decisions on probable cause are required to be made by a magistrate and not the officer engaged in ferreting out crime. *Johnson v. U.S.*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *McDonald v. U.S.*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948)

Petitioners ask the Court to answer why comparable treatment should not be afforded parties arrested without warrants when time and opportunity applies in that case.

Without this holding, the Fourth Amendment requirement for an arrest warrant is useless and seizure of a person requires less judicial authority than the seizure of property.

Based on the holding in *Watson*, this Court declined to "transform this judicial preference into a constitutional rule", however, due to the holding in *Payton v. New York*, supra, the Court has indeed stated this issue

reaches constitutional proportion by reversing the New York Supreme Court and at least two Circuit Courts of Appeal along with several state courts which held warrantless arrests in the home invalid when probable cause existed.

Indeed, according to the Court in *Payton*, a majority of the states allowed warrantless entries into the home to arrest even absent exigent circumstances, Mississippi in fact being one of the states. (Miss. Code of 1972, as annotated and amended, Section 99-3-11) The constitutionality of these laws is now seriously in question, if not implicitly declared invalid.

The entire analysis leaves the *Watson* holding in question not only because of the narrow issue addressed by *Payton* but by the apparent implication of its preference for warrants over warrantless arrests.

The fact is that the Court now does hold this issue is not simply a "judicial preference", but a violation of constitutional standards and petitioners ask this Court to move to *Payton* logical extension in the cause.

Petitioners were entitled to an expectation of privacy in their automobile and as the rationale of *Payton* should hold they were unlawfully arrested. The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. *Coolidge v. New Hampshire*, supra.

Finally the petitioners ask this Honorable Court to address the question as to what extent law enforcement officials may proceed without an arrest warrant when ample opportunity and availability of one is open to them.

2. Is the Mississippi Supreme Court's determination of probable cause based on self-verifying information contrary to this Honorable Court's assessment, thus denying petitioners due process of law?

All the information the agents had in this cause was given to them by the informant who testified at the trial. They received no other information and the rest of the testimony simply was concerning what their "investigation revealed".

The content of the informant's testimony, however, is of more serious dispute since the informer swore and stated unequivocally, absolutely, positively, and without a doubt that he told the agents petitioner Conway would go to pick up petitioner O'Brien.

The agents stated they did not know who to get a warrant for, therefore, that was their reason for not obtaining one. After following petitioner Conway to Mobile, only then did they say they had probable cause.

The reason for this is clear because the agents did not have a warrant and the informer was also unreliable and could not meet this Honorable Court's reliability

requirement of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. U.S.*, 398 U.S. 401 (1969); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Strode v. Miss.*, 231 So.2d 779 (1970)

The Mississippi Supreme Court stated the agents had probable cause because they received "self-verifying" information from what they saw at the airport similar to what had occurred in a previous Mississippi case. *Joyce v. Miss.*, 327 So.2d 255 (1976)

This Court in *Draper v. U.S.*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) stated the most important factor for a warrantless arrest was the determination of probable cause.

Draper stated and placed immense importance upon several factors from an admittedly reliable informant which were corroborated by the actual events that took place, yet here the informant was not proven reliable, because he could not be proven reliable. No specific details of what was to occur were present here as were relied on in *Draper*.

The legality of the arrest here turns on a similar question, since the officers did not have an arrest warrant and probable cause was not established, the arrest was illegal and the evidence seized incident to it must be suppressed. *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct. 280, 69

L.Ed. 543; *Giordenello v. U.S.*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503.

> "The arresting officers did not have a bit of evidence, known to them as to which they could take on oath had they gone to a magistrate, that petitioner had committed any crime. The arresting officers did not know the grounds on which the informer based his conclusions; nor did they seek to find out what they were. They acted solely on the informer's word. In my view that was not enough." *Draper*, supra, dissent.

This passage is important here, since nowhere was the two pronged reliability test of *Aguilar v. Texas* and its Mississippi counterpart, *Strode v. State*, in any way satisfied whatsoever.

If the officers had probable cause or an articulable suspicion, a magistrate was available before they left to follow petitioner to the airport in Mobile. While the officers were in Mobile they saw absolutely nothing in addition to what they had not already been told and that was not enough to arrest the petitioners.

This position should be addressed by this Honorable Court, for may an officer on one hand say that not enough probable cause for a warrant existed when he later arrested the parties without a warrant with no additional probable cause or information?

The "self-verification" apparently is anchored to the results or the fruits of the arrest and subsequent search, yet this should not be allowed to influence the decision to arrest or the assessment of probable cause before the fact. See *Joyce v. Miss.*, supra, dissent of Chief Justice Patterson.

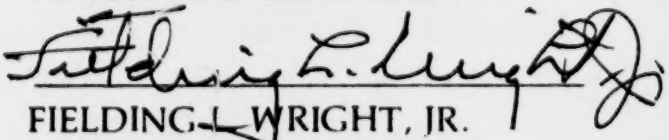
The Mississippi Supreme Court erred in assessing the facts and then in the absence of proof of the reliability of the informant, erred in finding probable cause. Petitioners ask this Court to determine if due process of law will allow the Mississippi Supreme Court decision, which does not conform with the decisions and precedent of this Honorable Court, to stand.

CONCLUSION

For the foregoing reasons, the petitioners would respectfully show that their writ of certiorari should be granted.

Respectfully submitted,

WRIGHT & HEIDELBERG



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CERTIFICATE OF SERVICE

I, Fielding L. Wright, Jr., hereby certify that I have this the 5th day of May, A.D., 1980, mailed first class, postage prepaid, 3 copies of the foregoing Petition for a Writ of Certiorari to William A. (Bill) Allain, Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi and Catherine Walker Underwood, Special Assistant Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi.

Fielding L. Wright Jr.

FIELDING L. WRIGHT, JR.
COUNSEL FOR PETITIONERS

"APPENDIX A"

IN THE SUPREME COURT OF MISSISSIPPI
NO. 51,741

JOHN CONWAY AND ROBERT O'BRIEN

versus

STATE OF MISSISSIPPI

March 12, 1980

BEFORE SMITH, SUGG AND BOWLING

BOWLING, JUSTICE, FOR THE COURT:

Appellants, John Conway and Robert O'Brien, were indicted and convicted in the Circuit Court of Jackson County for the possession of a controlled substance (methamphetamine) with intent to deliver in violation of Mississippi Code Annotated section 41-29-139 (1972 as amended). The jury returned a verdict of guilty as charged against both defendants. Each was sentenced to serve a term of twenty years with the Mississippi Department of Corrections, and a fine of $15,000 was imposed on each.

On appeal, appellants alleged two assignments of error, namely:

1. The trial court erred in overruling defendants' motion to suppress; and

2. That an alleged remark made by the district attorney in his argument to the jury constituted reversible error.

The motion to suppress was directed toward the methamphetamine substance secured from an automobile as hereinafter related. The motion contended that the evidence should have been suppressed because of both an illegal arrest and an illegal search.

There is practically no dispute in the facts of the occurrences leading to appellants' arrest. Testimony was received on the motion from three participating officers. There were five officers involved in the matter; however, it was stipulated that the testimony of the other two would be cumulative. The principal participant and the guiding figure in the entire matter was one Don Richards, who at the time was District Supervisor for the Gulfport office of the Mississippi Bureau of Narcotics. His testimony and the testimony of the other officers was that information had been received that a shipment of methamphetamine would arrive in the Jackson County area on the weekend of July 1 and 2, 1978, which dates were a Saturday and Sunday. On information from an informant, a search warrant was secured for a residence in Pascagoula where there lived Matthew Dixon and Richard Johnson and their respec-

tive wives. The activities surrounding the search of this residence took place late at night on July 1 and the early morning of July 2. During the course of the search of the residence, appellant John Conway came to the location where he and Agent Don Richards became acquainted.

The officers received information from Johnson that he had carried a man named "Obie" to Mobile, Alabama, on Saturday, July 1, for the purpose of the latter flying to Philadelphia, Pennsylvania, to secure the drugs, and returning on Sunday afternoon to Mobile, where he would be met by someone then unknown.

At noon on Sunday, July 2, the officers met for lunch in Pascagoula to discuss what action to take regarding the information received. As stated, the identity of the person who was to pick up "Obie" in Mobile at the air terminal was unknown. There was doubt that the delivery of the substance would take place due to publicity regarding the arrests the night before. During the afternoon of Sunday, the agents, under Richards' direction, decided to take a chance and go to the Mobile air terminal to conduct surveillance and try to ascertain whether or not the drug would be brought in by "Obie," who would meet him, and what action they would then take.

Late in the afternoon, appellant, John Conway, was observed driving into the air terminal parking lot and

entering the terminal. Dixon was also observed arriving in another vehicle and entering the terminal. They were observed talking to each other. At approximately 5:30 P.M., a plane arrived from Philadelphia, by way of Atlanta. "Obie," who was later identified as appellant Robert O'Brien, got off the plane carrying a small suitcase and met appellant Conway and Dixon. The three then went to the parking lot with "Obie" getting into Conway's vehicle with the bag. Both vehicles then headed toward Mississippi. The officers began surveillance of the two vehicles with the admitted intention of stopping them at some point after reaching the State of Mississippi. Shortly after crossing the state line, and before the officers had made any move to stop the vehicles, Conway and Dixon stopped on the side of the road, got out of their cars and approached each other. The officers, under the direction of Richards, immediately stopped both in front of and behind the two suspect vehicles. Upon approaching the Conway vehicle, one officer observed several small plastic bags in a larger plastic bag — all containing a white powdery substance — laying on the rear floorboard of the car in plain view. Conway, O'Brien and Dixon were immediately arrested and placed in the custody of the officers. The substance laying on the floorboard was seized.

One officer was left with the two vehicles, which were later towed by wreckers to Pascagoula. A search warrant for the vehicles was secured. Pursuant to this warrant, the suitcase that had been carried from the air

terminal by appellant O'Brien was seized, opened, and a relatively large amount of methamphetamines found therein. The evidence indicated that the drug was worth a considerable sum of money.

Appellants contend that their warrantless arrest was invalid. It is strongly urged that the officers had ample time and opportunity to apply for and secure a valid arrest warrant, and that without such warrant they did not have probable cause to make the arrests. The answers to these contentions are clear. During the early part of the morning of Sunday, July 2, the officers learned from Johnson, who had recently been arrested at his residence, that on July 1 he had taken a person known only to him as "Obie" to Mobile to catch a plane. Although the officers met appellant Conway at the time of Johnson's arrest, no information was secured by the officers at any time that Conway was the person who would meet "Obie" the next day in Mobile. No information was received by the officers that Dixon would also appear at the air terminal with Conway. The officers were more or less "shooting in the dark" when they decided on Sunday afternoon to go to Mobile, as they anticipated that the person known as "Obie" and never seen by them would be warned not to return to Mobile with the supply of drugs. The only warrant that the officers could possibly have secured would have been a so-called "John Doe" warrant. This was impractical because of the time element involved in traveling to Mobile and setting up surveillance prior to the arrival of the plane. The first identification of the

personalities involved in picking up "Obie" was when Conway and Dixon arrived shortly before the plane was due. Conway and Dixon were then observed meeting "Obie," who was carrying a small bag and all three were seen getting into the Conway and Dixon vehicles and heading toward Mississippi. The officers had no alternative but to follow, readily admitting that they intended to stop the two vehicles after reaching the Mississippi state line. The vehicles were not stopped by the officers, and it is clear from the record that an arrest was not made until the powdery substance was seen on the floorboard of the Conway vehicle. It is abundantly clear that under the authorities the officers had probable cause to arrest appellants and Dixon without a warrant.

In *United States v. Burnett*, 526 F.2d 911 (5th Cir. 1976), cert. den. 425 U.S. 977, 48 L.Ed.2d 801, 96 S.Ct. 2179, the Court said:

> Although appellants argue that the agents had ample opportunity to obtain an arrest or search warrant, this argument, even if true, does not invalidate their arrests. A warrantless arrest is lawful so long as the arresting officers have probable cause. E.g., United States v. Hofman, 488 F.2d 287 (5th Cir. 1974) (no warrant); United States v. Morris, 477 F.2d 657, 663 (5th Cir.), cert. denied, 414 U.S. 852, 94 S.Ct. 146, 38 L.Ed.2d 101 (1973) (invalid warrant).

In the more recent case of *United States v. Parker*, 549 F.2d 1217 (5th Cir. 1977), we find the following:

> Parker also contends that the government agents' failure to obtain an arrest warrant vitiated his arrest and rendered his subsequent confession illegal. Parker does not dispute that the agents had probable cause to arrest him, but asserts that they should have obtained a warrant in the approximately 34 hours between the time that they became aware of his whereabouts and the time of the arrest. This argument has no merit. While it is preferable for law enforcement officers to obtain arrest warrants where feasible, Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Wong Sun v. United States, 371 U.S. 471, 479-82, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), an arrest supported by probable cause should not be invalidated solely because the officers failed to secure a warrant, Gerstein v. Puch, 420 U.S. 103, 113, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); United States v. Hofman, 488 F.2d 287 (5th Cir. 1974). Although Parker argues that the officers had ample opportunity to obtain an arrest warrant, this argument, even if true, does not invalidate his arrest, United States v. Burnett, 526 F.2d 911 (5th Cir.), cert. denied, 425 U.S. 977, 96 S.Ct. 2179, 48 L.Ed.2d 801 (1976).

We, therefore, readily see that appellants cannot take advantage of the time element to complain that an arrest warrant was not secured. We now consider the question as to whether or not the officers had probable cause for the eventual arrest of the three persons.

In *Strode v. State*, 231 So.2d 779 (Miss. 1970), this Court, in discussing probable cause, said:

> Probable cause is a practical, nontechnical concept, based upon the conventional considerations of every day life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.

In *Joyce v. State*, 327 So.2d 255 (Miss. 1976), this Court, in holding that probable cause existed, stated as follows:

> Not only does the evidence prove the tip to be selfverifying, but also that an independent investigation was made before Wann's car was stopped and searched. The narcotics agents observed Wann picking up two very heavy

> suitcases at the baggage checkout and carrying them to his car. Sixty pounds of marijuana compressed in kilo bricks does not occupy much space. It could be carried in suitcases, but it would make them heavier than usual. They observed Joyce and his companions furtively and nervously looking around to see if anyone was watching them and then as they drove slowly away from the airport the agents observed Wann, the driver, frequently looking in his rear-view mirror and appellant and Saczynski, the passengers, frequently looking through the rear window.

In the case of *Isaacks v. State*, 350 So.2d 1340 (Miss. 1977), the Court, through Justice Inzer in the majority opinion and Justice Sugg in the dissenting opinion, discussed the many cases dealing with circumstances under which evidence may be seized when in "plain view" without a warrant. The majority opinion stated as follows:

> Only under certain circumstances may officers seize contraband in "plain view" without a warrant. They are: (1) incident to a valid arrest, (2) where officers have a valid search warrant to search a given area for specific objects and in the course of the search come across contraband, (3) incident to "hot pursuit" of a fleeing suspect, or (4) incident to a

> search of a stopped automobile on probable cause or because of the mobility of the vehicle.
>
> . . .

From the facts and circumstances hereinbefore related, it is evident that the conditions under (1) and (4) apply here. As for (1), we have already seen that before the contraband was viewed, probable cause existed for a warrantless arrest of appellants. The seizure of the contraband can also be justified under (4), as there was probable cause to stop the car, and the narcotics agents were then entitled to seize the powdery substance within their plain view. Green v. State, 348 So.2d 428 (Miss. 1977).

The United States Supreme Court also has spoken on the situation where contraband objects are in plain view of an officer who has a right to be where the objects may be seen. In *Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968), it was said:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. . . .

The trial court was correct in overruling appellants' motion to suppress.

Appellants claim reversible error because of an alleged statement made by the district attorney in argument to the jury. The only thing in this record in this regard is the following that was dictated to the court reporter after the closing arguments had been made:

> BY MR. WRIGHT: In view of the fact that the closing arguments of all counsel was not being recorded, and for the purpose of the record, the defendant moved for a mistrial based on a comment made by the assistant district attorney, Joe R. Colingo, during his closing argument to the effect that the testimony was uncontradicted. At which point counsel objected and moved for a mistrial based on such a statement being a comment on the defendant not rebutting any testimony.
>
> BY MR. HUNTER: May it please the court, the only exception to that is I believe the statement was, that the evidence was uncontradicted.
>
> BY MR. COLINGO: That's what the statement was.
>
> BY MR. WRIGHT: It's the same thing.
>
> BY MR. COLINGO: No, it's not.
>
> BY THE COURT: There is a case on it, but I will overrule it.

There is no way that this Court can determine the context in which the alleged statement of the district attorney was made to the effect that "the testimony" was uncontradicted. This Court has held many times that each case must be considered individually where there is a question as to the prosecution's comments on the defendant's failure to testify. In *Peterson v. State*, 357 So.2d 113 (Miss. 1978), we said:

> Each case on these types of matters has to be considered in the light of that particular case. The facts of all are different. . .

In *Barnes v. State*, 230 Miss. 299, 92 So.2d 863 (1957), this Court stated:

> The county attorney, in his argument to the jury, said: "Mr. Anderson testified the value of the feed as being $3.50 a sack and that is not disputed. . ." It will be noted that the remarks had reference only to the value of the feed. They were not directed to whether Barnes was guilty or innocent of the stealing. Other witnesses could have testified to such values — not just Barnes himself. The remarks did not apply especially to Barnes. They were applicable to any witness Barnes might have produced to testify about the value of the property. The remarks were general — not personal. As a matter of fact, Barnes did not

> place any witness upon the stand. He produced no testimony whatever. In addition, Barnes could not have been prejudiced by the remarks for the reason that he obtained this instruction: "The court instructs the jury for the defendant that you cannot convict the defendant simply because he did not testify." That instruction was read to the jury before any argument was made. It called to the attention of the jurors in the most pointed and forceable way the fact that the defendant did not testify. It was much more effective in directing the attention of the jury to the failure of Barnes to testify than were the remarks of the county attorney.

In *Smith v. United States,* 234 F.2d 385 (5th Cir. 1956), we find the following:

> We think it quite clear that this was fair comment on the defendant's failure to produce witnesses touching on a subject which he injected in his conduct of the trial. During his argument and cross-examination of witnesses, he referred to alleged criminal acts of government witnesses. The comment by the United States Attorney that the accused had the opportunity to present any criminal action in the form of testimony is similar to that which was found by the court to be unobjec-

> tionable in Langford v. United States. There a statement by counsel that "the defendant had no witness to impeach the stories of [government witnesses]" was held by the court to be in substance a statement that the stories were not contradicted. As this court has said in Jamail v. United States, the rule against commenting on the failure of a defendant to testify in his own behalf "does not go to the extent of forbidding argument by counsel for the prosecution to the effect that the evidence against a defendant is uncontradicted." The same is true with respect to a failure to produce testimony on any phase of the defense upon which the accused seeks to rely.

In *Clark v. State*, 260 So.2d 445 (Miss. 1972), we stated the following:

> . . . There are a few cases where the comments are of the character here under consideration in which we have held that the comments did not amount to reversible error. In those cases there was either an eye witness other than the accused available to him and who was not placed on the stand, or the guilt of the accused was so manifest that no fair jury could have returned a verdict other than guilty. Chatman v. State, 244 Miss. 659, 145 So.2d 707 (1962). . . .

In *Lambert v. State*, 199 Miss. 790, 25 So.2d 477 (1946), this Court stated in discussing the question now before us:

> . . . "the testimony for the state" includes all matters on which the state introduces evidence. . ." "Uncontradicted" would include all evidence of a contradictory nature, even circumstantial evidence. . . .

In *Johnson v. State*, 109 Miss. 622, 68 So. 917 (1915), the alleged statement by the prosecuting attorney was almost identical with the one propounded here. The Court, in affirming the conviction, stated:

> The evidence for the state was uncontradicted — it stood alone as the evidence in the case — and to say so, in our opinion, cannot be construed as any sort of reference, of any character whatever, to the failure of defendant to testify. To so hold, it seems to us, would be to deny to the state the privilege of arguing the case at all.

In *Lambert v. State, supra*, and as reaffirmed in *Chatman v. State, supra*, it was stated:

> . . . this Court has reversed for comments of the character here under consideration, unless (1) there was an eye witness other than defendant available to the accused and who

was not placed upon the stand by him, or (2) the guilt of the defendant was so manifest that no fair jury could have returned a verdict other than guilty.

Also see *Martin v. State,* 200 Miss. 142, 26 So.2d 169 (1946).

As hereinbefore emphasized, based on the record before us, we are unable to make a reasonably accurate determination as to the context in which the alleged statement was used. There was no bill of exceptions requested. No testimony or evidence whatever was introduced by the appellants and the statement could have been made in connection with many "objects of evidence" that were uncontradicted. Furthermore, as stated in *Chatman, supra,* no fair minded jury could have returned a verdict other than guilty in this case.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, LEE AND COFER, JJ., CONCUR.

ATTEST:
A True Copy
This the 16th day of April, 1980
ROBERT E. WOMACK, CLERK
SUPREME COURT OF MISSISSIPPI
/s/ DEBBIE HOLMES

"APPENDIX B"

MANDATE FROM THE
SUPREME COURT OF MISSISSIPPI

JOHN CONWAY AND ROBERT O'BRIEN

versus No. 51,741

STATE OF MISSISSIPPI

Filed: April 22, 1980

To the Circuit Court of Jackson County—Greetings:

WHEREAS, on the 12th day of March, 1980, the same being a day of the regular term of the Mississippi Supreme Court, begun and held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, on the 1st Monday of March, in the year of our Lord, 1980, the following final judgment was rendered by the Mississippi Supreme Court, to-wit:

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of Jackson County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 15th day of May, 1979—a

conviction of POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO DELIVER and a sentence to serve a term of TWENTY (20) YEARS in the custody of the Mississippi Department of Corrections and to pay a fine of $15,000.00—be and the same is hereby affirmed. It is further ordered and adjudged that the appellants do pay all of the costs of this appeal to be taxed for which let proper process issue.

YOU ARE THEREFORE HEREBY COMMANDED, that such execution and further proceedings be had in said cause, as according to right and justice, and the judgment of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Neville Patterson, Chief Justice of the Mississippi Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, in the City of Jackson, this the 18th day of April, A.D., 1980.

/s/ ROBERT E. WOMACK
Clerk

Circuit Court No. 8974

"APPENDIX C"

MINUTES, SUPREME COURT OF MISSISSIPPI
MARCH TERM, 1980

WEDNESDAY, APRIL 16, 1980, COURT SITTING:

JOHN CONWAY AND ROBERT O'BRIEN

versus No. 51,741

STATE

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

ATTEST:
A True Copy.
This the 17th day of April, 1980.
ROBERT E. WOMACK, CLERK
SUPREME COURT OF MISSISSIPPI

/s/ L. PUCKETT.